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No. 95-398

In the Supreme Court of the United States

OCTOBER TERM, 1995

DANIEL A. BOUDREAU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 33 U.S.C. 702c, which provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place," bars petitioner's tort action for damages arising from personal injuries sustained as a result of the allegedly negligent towing by the Coast Guard Auxiliary of petitioner's disabled vessel on a federal flood control lake.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 53 F.3d 81. The opinion of the district court (Pet. App. 14-21) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1995. A petition for rehearing was denied on June 13, 1995. Pet. App. 22. The petition for a writ of certiorari was filed on September 11, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, Daniel Boudreau, was injured as his disabled vessel was being towed by a Coast Guard Auxiliary vessel on a federal flood control lake. He alleged that he was injured by the Coast Guard Auxiliary's negligence. The district court dismissed the complaint, holding that it was barred by the Flood Control Act of 1928, 33 U.S.C. 702c. Pet. App. 14-21. The court of appeals affirmed, with one judge dissenting. *Id.* at 1-13.

1. On July 5, 1992, petitioner experienced engine trouble while boating on Lake Lewisville, Texas, a federal flood control lake. Pet. App. 14. Petitioner called the Coast Guard Auxiliary by radio and was told to anchor the vessel. *Id.* at 15. The Coast Guard subsequently arrived, secured a tow line, and instructed petitioner to lift the anchor or cut the line. Petitioner attempted to lift the anchor, but it broke free and caused injury to petitioner's leg. *Id.* at 15-16.

2. Petitioner brought this negligence action against the United States pursuant to the Public Vessels Act, 46 U.S.C. 781 *et seq.*, and the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, in the United States District Court for the Northern District of Texas. Pet. App. 14. The United States moved pursuant to Fed. R. Civ. P. 12(b)(1) to dismiss the complaint for lack of subject matter jurisdiction, arguing that the United States was immune under the Flood Control Act of 1928, 33 U.S.C. 702c. Section 702c provides in pertinent part:

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *.

The district court granted the government's motion to dismiss. Pet. App. 14-21. The district court stated that, under *United States* v. *James*, 478 U.S. 597 (1986), the United States is immune from suit for injuries allegedly caused by the negligent management of a flood control project. Pet. App. 16. The district court concluded that, since petitioner alleged injuries in connection with the Coast Guard Auxiliary's management of Lake Lewisville, the United States was immune from the suit under *James*. *Id.* at 18-20.

3. The court of appeals affirmed. Based on a "fact-specific analysis" limited to the instant case, Pet. App. 6, the court found a "sufficient association between the Coast Guard Auxiliary's activities and flood control" for Section 702c to bar petitioner's suit. Pet. App. 6. The court noted this Court's "conclu[sion] in *James* that even the Government's *failure to warn* recreational visitors of dangerous conditions fell within 'the "management" of a flood control project.'" *Id.* at 8. The court concluded that "[s]uch management is involved here." *Ibid.* The court recognized the possibility that in some cases "'management of a flood control project' may well be insufficient, standing alone, to allow for [Section] 702c immunity," especially if the accident on which the claim is based occurs away from the water. Pet. App. 9. In this case, however, petitioner's injuries resulted "from a *boating* accident on *flood control waters* involving the *Government's patrol of those waters*," leading the court to find, "based on the facts at hand," a sufficient nexus between petitioner's injuries and flood control. *Ibid.*

ARGUMENT

When Congress embarked in 1928 upon a major program to construct dams and other structures for flood control, one of the issues it faced was the scope of the federal government's immunity from liability for damages resulting from its flood control activities. Congress limited the government's financial exposure by including in the 1928 legislation a provision that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. 702c.

This Court considered the meaning of Section 702c in *United States* v. *James*, 478 U.S. 597 (1986). The two cases decided in *James* involved personal injuries to recreational users of an artificial lake constructed by the United States for purposes of flood control. In each case, currents created by the Army Corps of Engineers' release of waters from the lake pulled individuals into the dam's retaining structures. In one case, a string of buoys delineating the area of danger had broken and drifted away; in the other case, signs intended to warn recreational users about dangerous currents were not adequately visible. See *id.* at 600-602. The question presented in *James* was whether Section 702c "bars recovery where the Federal Government would otherwise be liable * * * for personal injury caused by the Federal Government's negligent failure to warn of the dangers from the release of floodwaters from federal flood control projects." 478 U.S. at 598-599.

A primary issue in *James* was whether Section 702c's immunity applies to suits for personal injury as well as to suits for property damage. The Court

held that the statutory immunity provision applies to both kinds of damage claims. 478 U.S. at 605. The Court noted, in this connection, that Section 702c "outlines immunity in sweeping terms," that "[i]t is difficult to imagine broader language," and that "Congress' choice of the language '*any* damage' and 'liability of *any* kind' further undercuts a narrow construction." 478 U.S. at 604-605. The Court noted that the statute's legislative history confirms "that the sweeping language of § 702c was no drafting inadvertence," and that "Congress clearly sought to ensure beyond doubt that sovereign immunity would protect the Government from 'any' liability associated with flood control." 478 U.S. at 608.

With respect to the scope of immunity from personal injury liability, the Court held that Section 702c covered the recreational accidents involved in the cases before it. The Court stated that the terms "floods" and "flood waters" "apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control." 478 U.S. at 605. Because the waters in which the accidents occurred were contained in a federal flood control project, those waters "clearly [fell] within the ambit of the statute." *Ibid.* The Court rejected plaintiffs' argument that the government "is not entitled to immunity * * * because their injuries arose from Government employees' alleged mismanagement of recreational activities wholly unrelated to flood control." *Id.* at 609-610. It held that "the manner in which to convey warnings, including the negligent failure to do so, is part of the 'management' of a flood control project." *Id.* at 610.

The decision below is the latest in a series of cases since *James* in which the courts of appeals have applied Section 702c to personal injury claims involving federal flood control lakes. At least eleven cases have held that the government is immune from suit, while two cases have rejected the government's immunity defense. See *Reese* v. *South Florida Water Management District*, 59 F.3d 1128 (11th Cir. 1995) (holding government immune from claim involving recreational swimming accident at a federal flood control lake); *Holt* v. *United States*, 46 F.3d 1000, 1005 (10th Cir. 1995) (government immune from suit where mist from water released from dam created ice slick on adjacent road); *Fisher* v. *United States Army Corps of Engineers*, 31 F.3d 683 (8th Cir. 1994) (recreational diving accident); *Thomas* v. *United States*, 959 F.2d 232 (4th Cir. 1992) (recreational diving accident) (Table); *Zavadil* v. *United States*, 908 F.2d 334 (8th Cir. 1990) (recreational diving accident), cert. denied, 498 U.S. 1108 (1991); *Hiersche* v. *United States*, 933 F.2d 1014 (9th Cir. 1991) (accident involving professional diver inspecting dam's underwater fish screens) (Table), cert. denied, 503 U.S. 923 (1992); *Fryman* v. *United States*, 901 F.2d 79 (7th Cir.) (recreational diving accident), cert. denied, 498 U.S. 920 (1990); *Dawson* v. *United States*, 894 F.2d 70 (3d Cir. 1990) (recreational swimming accident); *Dewitt Bank & Trust Co.* v. *United States*, 878 F.2d 246 (8th Cir. 1989) (diving accident), cert. denied, 494 U.S. 1016 (1990); *Mocklin* v. *Orleans Levee Dist.*, 877 F.2d 427 (5th Cir. 1989) (swimming accident); *McCarthy* v. *United States*, 850 F.2d 558, 561 (9th Cir. 1988) (diving accident), cert. denied, 489 U.S. 1052 (1989). But see *Henderson* v. *United States*, 965 F.2d 1488 (8th Cir. 1992) (no immunity from claim by

recreational wade fisherman); *Boyd* v. *United States*, 881 F.2d 895 (10th Cir. 1989) (no immunity from claim by snorkeler struck by boat). In five of the cases in which immunity was upheld, this Court denied petitions for a writ of certiorari.

Every court since *James* that has addressed the application of Section 702c to personal injury claims has held that there must be some nexus between the injury giving rise to the claim and the government's management of flood waters to warrant Section 702c immunity. Petitioner states that the lower courts are "radical[ly] split" on the issue of how to determine whether a sufficient nexus exists and that the courts have adopted six distinct tests for that purpose. Pet. 4. Despite some semantic differences, however, there appear to be two basic approaches. On the one hand, the Third, Fifth and Ninth Circuits have held that Section 702c bars all claims arising from injuries at flood control projects unless the injuries are *wholly unrelated* to flood control. See, *e.g.*, *Dawson*, 894 F.2d at 73-74; *Mocklin*, 877 F.2d at 430 & n.6; *McCarthy*, 850 F.2d at 562-563. On the other hand, the Seventh, Eighth and Tenth Circuits have declined to adopt the "wholly unrelated" standard and have suggested that Section 702c requires a more substantial nexus between the injury and flood control activities than the "wholly unrelated" standard seems to require. See, *e.g.*, *Fryman*, 901 F.2d at 82 (questioning the "wholly unrelated" approach and suggesting that flood control activities must "increase the probability" of injury); *Fisher*, 31 F.3d at 684 (Section 702c immunity applies only if "governmental control of flood waters was a substantial factor" in causing the injuries); *Holt*, 46 F.3d at 1003-1004 (criticizing the "wholly unrelated"

test and adopting a fact-based inquiry into the "nexus" between flood control activities and the injury).

The two formulations are similar in that each requires examination of the factual nexus between the government's management of flood waters and the injury involved. The difference between the formulations is not always easy to discern. For example, the Third Circuit (a "wholly unrelated" jurisdiction) suggested in *Dawson* that an injury may be "wholly unrelated" to flood control if waters contained by the flood control project are not "a substantial factor in [causing] injuries." 894 F.2d at 74 (citing *McCarthy*, 850 F.2d at 561-562). See also *Bailey* v. *United States*, 35 F.3d 1118, 1121 (7th Cir. 1994) (noting that "in practice, the Eighth Circuit's 'substantial factor' analysis operates much like the 'wholly unrelated' inquiry as applied by the Third Circuit in *Dawson*.") And as a practical matter, the two approaches have produced similar results. Thus, the courts have generally held under either standard that Section 702c precludes government liability for swimming, diving, or boating accidents if the government's management of flood waters contributed to the injury. See, *e.g.*, *Reese*, 59 F.3d at 1129-1131 (release of waters from dam, for reasons partially related to flood control, created currents that contributed to accident); *Dawson*, 894 F.2d at 74 (same); *Hiersche* v. *United States*, 933 F.2d 1014 (9th Cir. 1991) (Table) (same); *Mocklin*, 877 F.2d at 430 (dredging at flood control project created sudden drop-off in lake floor which contributed to drowning); *Fryman*, 901 F.2d at 82 (fluctuation of water levels at flood control project contributed to diving hazard); *DeWitt*, 878 F.2d at 246 (same); *Fisher*, 31 F.3d at 684-685 (shallow water re-

sulting from operation of flood control project created diving hazard).

In the two cases in which the government's Section 702c immunity defense was rejected, the courts of appeals ruled that the government had failed to demonstrate an adequate nexus under the specific facts involved. In *Henderson* v. *United States*, 965 F.2d 1488 (8th Cir. 1992), the court of appeals held that the United States was not immune from a wrongful death action after a fisherman drowned in water currents caused by release of water from a dam. Although the Army Corps of Engineers caused the water to be released, the court noted that the Corps was following the directions of a private power company that was operating the dam solely for purposes of generating electricity. 965 F.2d at 1492. The court could not conclude that "government control of flood waters was a substantial factor in causing" the alleged injuries, and thus held that the government could not invoke Section 702c as a defense. *Ibid.*

In *Boyd* v. *United States*, 881 F.2d 895 (10th Cir. 1989), the court of appeals held that Section 702c did not bar a suit for damages incurred when a snorkeler was struck and killed by a privately operated power boat at a flood control lake. The suit was based, *inter alia*, on the government's allegedly negligent failure to warn swimmers that boating was permitted in the area. The court of appeals stated that a sufficient nexus between the injury and flood control does not exist if the government can only show that "the injury would not have occurred but for the creation of a flood control lake." 881 F.2d at 900. The court expressly limited its holding to the facts of the case before it: "Without attempting to delineate for every

conceivable situation the necessary link between flood control activities and injuries sustained at a flood control project before § 702c immunity applies, in the present case we hold that the requisite nexus has not been established." *Ibid.*[1]

Petitioner contends that the decision below conflicts with *Henderson* and *Boyd*. In this case, however, the government made a stronger showing than it did in those cases of the factual nexus between the government's management of the flood waters and the injury. As the district court explained, the "active presence" of the Coast Guard Auxiliary patrolling the waters of Lake Lewisville "is part of the Government's management of [the lake] and serves to control the waters in a variety of capacities." Pet. App. 18. The court of appeals found that the Auxiliary's water safety patrols were part of the "management of a flood control project," *id.* at 9, and that petitioner's injury occurred during the use of "*flood control waters* involving the *Government's patrol of those waters*." *Ibid.* Although the court recognized that not every aspect of the management of a flood control project would warrant immunity, it held that the government should not be liable under "the facts at hand." *Ibid.*[2]

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[1] The Tenth Circuit subsequently found a sufficient nexus where mist from water released from a dam caused an ice slick on an adjacent road. See *Holt* v. *United States*, 46 F.3d 1000, 1004-1005 (10th Cir. 1995).

[2] The court of appeals left "for another day" the question of whether Section 702c would preclude liability for negligently building roads or hiring staff in connection with "management of a flood control project." Pet. App. 9 (noting the hypothetical example posed by the Seventh Circuit, see *Fryman*, 901 F.2d at 81, of a case in which the Army Corps of Engineers

The issue of whether there is a sufficient nexus between the government's management of flood waters and a particular injury requires a fact intensive inquiry. See *Holt*, 46 F.3d at 1004; *Mocklin*, 877 F.2d at 429-430. See also *Bailey*, 35 F.3d at 1118 (vacating district court's dismissal under Section 702c and remanding for further factual development as to whether injuries had a sufficient nexus to flood control). This Court was aware of some divergence in approaches among the circuits in applying Section 702c when it denied the petition for writ of certiorari in *Hiersche* v. *United States*, 503 U.S. 923 (1992) (Stevens, J., memorandum respecting the denial of certiorari). That situation has not changed. Existing differences in approach, moreover, have not resulted in any marked lack of uniformity of results. In these circumstances, it is not evident that review of this case is needed in order to provide additional guidance to the lower courts in conducting an inherently fact-laden inquiry.

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allowed "a walrus-sized pothole to swallow tourists' cars on the way to the beach").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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